



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** EPD Enterprises, Inc.

**File:** B-234193

**Date:** February 21, 1989

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### **DIGEST**

The General Accounting Office will not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of the procurement officials or that definitive responsibility criteria in the solicitation were misapplied.

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### **DECISION**

EPD Enterprises, Inc., protests the proposed award of a contract to Industrial Waste Services, Inc., under invitation for bids No. F08621-88-B0031, issued by the Department of the Air Force for refuse collection at Homestead Air Force Base, Florida. EPD protests the contracting officer's affirmative determination of Industrial's responsibility.

We dismiss the protest.

By letter dated October 14, 1988, EPD protested to the contracting officer that Industrial was not a responsible bidder because it had engaged in bid rigging which resulted in a civil action by the State of Florida and a consent decree prohibiting future antitrust violations and imposing penalties and damages. EPD also advised the contracting officer that the United States Department of Justice instituted federal antitrust charges against Industrial which resulted in a no contest plea and a fine in excess of \$300,000. By letter to the contracting officer dated October 26, EPD alleged that there were pending criminal charges against Industrial as well as a pending civil suit in Florida alleging civil racketeering charges. EPD states that it sent copies of the complaint and amended complaint in the latter civil action to the contracting officer on December 9.

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The contracting officer denied EPD's protest on January 3, 1989, stating that she had reviewed the protest and supporting evidence, conducted an investigation into Industrial's integrity and business ethics, and determined that Industrial was a responsible bidder. The contracting officer noted that in her investigation of Industrial, specifically the "no contest" plea and the Florida lawsuits, she had determined that its present business ethics and integrity supported award.

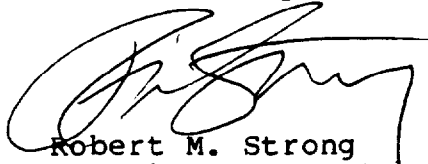
EPD protested to our Office on January 19, contending that the course of conduct by the contracting officer constitutes negligence and a failure to properly evaluate Industrial's responsibility. According to EPD, the contracting officer failed to obtain public records about the alleged pending civil racketeering charges against Industrial, and but for EPD's efforts, would not have had the information provided to our Office in connection with the protest. EPD argues that it is difficult to comprehend how the contracting officer, even with broad discretion, can determine Industrial responsible in light of past history and present allegations of violations of federal and state laws.

Under our Bid Protest Regulations, we will not review a contracting officer's affirmative responsibility determination absent a showing that it was made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. See 4 C.F.R. § 21.3(m)(3) (1988). In order to show that a responsibility determination was made in bad faith, the protester has a heavy burden of proof; procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually irrefutable proof that they had a specific and malicious intent to harm the protester. Ingram Barge Co., B-230672, June 28, 1988, 88-1 CPD ¶ 614.

EPD's protest falls short of the high standard of proof required to show bad faith. The worst inference to be drawn from EPD's allegation about the contracting officer's failure to obtain public records on pending charges against Industrial would be that the contracting officer was negligent in determining Industrial responsible. We have held, however, that the scope of our review of affirmative responsibility determinations does not extend to cases involving negligence. Canadian General Electric Company, Ltd., B-223934.3, July 10, 1987, 87-2 CPD ¶ 29. In any event, the record here shows that EPD provided the contracting officer with all the data provided to our Office in connection with the protest, and the contracting officer concluded, after reviewing this information and conducting an investigation, that Industrial's present business ethics

and integrity supported the award. While EPD may reasonably disagree with the contracting officer's determination of responsibility, the mere fact that EPD disagrees does not suffice to show that the contracting officer acted in bad faith. See Teledyne CME, B-223609, Sept. 23, 1986, 86-2 CPD ¶ 338.

Accordingly, we find that EPD has not stated a valid basis of protest, and we dismiss the protest pursuant to our Regulations without requesting a report from the agency. 4 C.F.R. § 21.3(m). In view of this dismissal, we also find that the conference the protester has requested would serve no useful purpose. Nationwide Glove Co., B-229690, Dec. 23, 1987, 67 Comp. Gen. \_\_\_\_ (1987), 87-2 CPD ¶ 624.



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